

³ The Board notes that, following the May 25, 2021 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

ISSUES

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,402.67 for the period September 1, 2016 through November 7, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits without appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$500.00 from appellant's continuing compensation payments every 28 days.

FACTUAL HISTORY

On March 8, 2006 appellant, then a 55-year-old tractor trailer operator, filed a traumatic injury claim (Form CA-1) alleging that on March 9, 2006 he injured his right eye and both knees when he slipped, lost his balance, and fell head first from his vehicle while in the performance of duty. He stopped work on the date of injury. OWCP accepted the claim for open wound of the forehead, bilateral knee sprain, medial meniscus tear of the left knee, neck sprain, bilateral wrist sprain/traumatic arthropathy, bilateral carpal tunnel syndrome, sensory disorders of the eyelid, brachial neuritis or radiculitis, post-concussion syndrome, and post-traumatic intractable vascular migraine headache. It paid appellant wage-loss compensation on the supplemental rolls as of April 24, 2006 and on the periodic rolls as of October 29, 2006. Appellant was separated from employment on June 21, 2008.

On March 22, 2019 and October 21, 2020 OWCP forwarded a FERS/SSA dual benefits worksheet to SSA.

On October 28, 2020 SSA provided OWCP with a completed FERS/SSA dual benefit form. The form indicated that appellant became entitled to SSA age-related retirement benefits, effective September 2016. The form further indicated that, with FERS, appellant was entitled to monthly payments of \$2,370.70, effective September 2016; \$2,377.80, effective December 2016; \$2,425.30, effective December 2017; \$2,493.20, effective December 2018; and \$2,533.00, effective December 2019. Without FERS, he was entitled to a monthly payment rate of \$2,209.50, effective September 2016; \$2,216.10, effective December 2016; \$2,260.40, effective December 2017; \$2,323.60, effective December 2018; and \$2,360.70, effective December 2019.

OWCP completed a FERS offset overpayment calculation worksheet on November 5, 2020. It calculated the amount that it should have offset from appellant's wage-loss compensation from September 1, 2016 through November 7, 2020. OWCP found that, effective September 1, 2016, the monthly offset was \$161.20 or \$148.80 every 28 days; effective December 1, 2016, the monthly offset was \$161.70 or \$149.26 every 28 days; effective December 1, 2017, the monthly offset was \$164.90 or \$152.22 every 28 days; effective December 1, 2018, the monthly offset was \$169.60 or \$156.55 every 28 days; and effective December 1, 2019, the monthly offset was \$172.30 or \$159.05 every 28 days. It divided the 28-day offset amount to find the daily amount, which it multiplied by the number of days in each period from September 1, 2016 through November 7, 2020 to find the amount that it had overpaid appellant for each period. OWCP added the amounts for each period and determined that it should have offset a total of \$8,402.67 from his wage-loss compensation.

In a November 10, 2020 letter, OWCP informed appellant that it would begin deducting \$159.05, the portion of SSA age-related retirement benefits attributable to his federal service, from his ongoing 28-day periodic compensation payments.

On November 10, 2020 OWCP notified appellant of its preliminary overpayment determination that he had received an overpayment of compensation in the amount of \$8,402.67 because it had failed to reduce his wage-loss compensation for the period September 1, 2016 through November 7, 2020 by the portion of his SSA age-related retirement benefits that was attributable to federal service. It further advised him of its preliminary determination that he was without fault in the creation of the overpayment. OWCP requested that appellant complete an enclosed overpayment recovery questionnaire (Form OWCP-20) and submit supporting financial documentation, including income tax returns, bank account statements, bills and cancelled checks, pay slips, and any other records to support her reported income and expenses. Additionally, it provided an overpayment action request form and advised her that, within 30 days of the date of the letter, she could request a final decision based on the written record or request a prerecoupment hearing.

On December 4, 2020 appellant requested waiver of recovery of the overpayment and a prerecoupment hearing. The hearing was held telephonically on March 11, 2021.

On December 15, 2020 appellant provided a completed Form OWCP-20 listing total monthly income of \$6,311.08 including his SSA benefits of \$2,388.00 and his wife's SSA benefits of \$989.00, Department of Veterans Affairs (VA) benefits of \$1,234.68, and Teamsters pension of \$1,700.00. He listed total monthly expenses of \$5,014.46. Appellant listed assets totaling \$2,761.18 including \$124.00 in cash, and \$2,637.18 in his checking account.

By decision date May 18, 2021, OWCP's hearing representative finalized the preliminary overpayment determination, finding that appellant had received an \$8,402.67 overpayment of compensation from September 1, 2016 through November 7, 2020 because he had concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without the appropriate offset. He also found that appellant was without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment. OWCP's hearing representative listed appellant's monthly income as \$7,497.00 because he had not included his FECA benefits of \$2,689.53 a month, resulting in a total monthly income of \$9,001.21. He found that appellant's monthly income exceeded his monthly expenses of \$5,014.46 by more than \$50.00 a month, such that recovery of the overpayment would not defeat the purpose of FECA. OWCP's hearing representative explained that, because appellant failed to meet the first prong of two-prong test of whether recovery of the overpayment would defeat the purpose of FECA, it was not necessary to consider waiver of recovery on this basis. He further found appellant had not submitted evidence that he made any financial decision that changed his position for the worse as a result of the receipt of the overpaid benefits and, therefore, had not established that recovery of the debt would be against equity and good conscience. OWCP's hearing representative required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation payments.

LEGAL PRECEDENT -- ISSUE 1

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of his or her duty.⁴ Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.⁵

Section 10.421(d) of OWCP's implementing regulations requires OWCP to reduce the amount of compensation by the amount of any SSA age-related retirement benefits that are attributable to the employee's federal service.⁶ FECA Bulletin No. 97-09 states that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.⁷

ANALYSIS -- ISSUE 1

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$8,402.67 for the period September 1, 2016 through November 7, 2020 for which he was without fault, because he concurrently received FECA wage-loss compensation benefits and SSA age-related retirement benefits without appropriate offset.

As noted, a claimant cannot concurrently receive FECA wage-loss compensation and SSA age-related retirement benefits attributable to federal service for the same period.⁸ OWCP paid appellant wage-loss compensation for total disability for the period September 1, 2016 through November 7, 2020. The information provided by SSA establishes that he began receiving SSA age-related retirement benefits on September 1, 2016. Accordingly, the Board finds that fact of overpayment has been established.⁹

To determine the amount of the overpayment, the portion of SSA age-related retirement benefits attributable to federal service must be calculated. OWCP received documentation from SSA with respect to the specific amount of SSA age-related retirement benefits that were attributable to federal service. SSA provided the SSA rates with FERS and without FERS for specific periods from September 1, 2016 through November 7, 2020. OWCP set forth its calculations of the amount that should have been offset during the relevant period based on information provided by SSA for the period September 1, 2016 through November 7, 2020.

⁴ 5 U.S.C. § 8102(a).

⁵ *Id.* at § 8116.

⁶ 20 C.F.R. § 10.421(d); *see S.M.*, Docket No. 17-1802 (issued August 20, 2018).

⁷ FECA Bulletin No. 97-09 (February 3, 1997). *See also N.B.*, Docket No. 18-0795 (issued January 4, 2019).

⁸ *Supra* note 5.

⁹ *See S.H.*, Docket No. 20-1157 (issued December 23, 2020); *K.H.*, Docket No. 18-0171 (issued August 2, 2018).

The Board has reviewed OWCP's calculation of dual benefits received by appellant for the period September 1, 2016 through November 7, 2020 and finds that an overpayment of compensation in the amount of \$8,402.67 was created.¹⁰

LEGAL PRECEDENT -- ISSUE 2

Section 8129 of FECA¹¹ provides that an overpayment must be recovered unless incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience. Thus, a finding that appellant was without fault does not automatically result in waiver of the overpayment. OWCP must exercise its discretion to determine whether recovery of the overpayment would defeat the purpose of FECA or would be against equity and good conscience.¹²

According to 20 C.F.R. § 10.436, recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and also, if the beneficiary's assets do not exceed a specified amount as determined by OWCP from data provided by the Bureau of Labor Statistics.¹³

ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant not at fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.¹⁴ It considered his financial information to determine if recovery of the overpayment would defeat the purpose of FECA.

The Board finds that OWCP properly determined that appellant did not require substantially all of his income to meet ordinary living expenses. It found that, after its review of the evidence of record, he had total current monthly income of \$9,001.21 and total monthly expenses of \$5,014.46, which left more than \$50.00 of disposable income with which to repay the debt. As appellant's monthly income exceeds his ordinary and necessary living expenses by more

¹⁰ See *N.B.*, Docket No. 20-0727 (issued January 26, 2021); *L.L.*, Docket No. 18-1103 (issued March 5, 2019).

¹¹ *Supra* note 3.

¹² *J.T.*, Docket No. 21-0010 (issued September 30, 2021); *G.L.*, Docket No. 19-0297 (issued October 23, 2019).

¹³ 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Its procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Final Overpayment Determinations*, Chapter 6.400.4a(2) and (3) (September 2020).

¹⁴ *Id.* at § 10.436.

than \$50.00, the Board finds that he did not need substantially all of his income for ordinary and necessary living expenses.

As appellant failed to establish that recovery of the overpayment of compensation would either defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP did not abuse its discretion in denying waiver of recovery of the overpayment.

LEGAL PRECEDENT -- ISSUE 3

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.¹⁵

Section 10.411 of OWCP's regulations provides in pertinent part:

"When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship."¹⁶

ANALYSIS -- ISSUE 3

The Board finds that OWCP properly required recovery of the overpayment by deducting \$500.00 every 28 days from appellant's continuing compensation.

The record supports that, in requiring repayment of the overpayment by deducting \$500.00 from appellant's compensation payments every 28 days, OWCP took into consideration the financial information he submitted as well as the factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize resulting hardship. Therefore, OWCP properly required recovery of the overpayment by deducting \$500.00 from his continuing compensation every 28 days.¹⁷

CONCLUSION

The Board finds that appellant received an overpayment of compensation in the amount of \$8,402.67 for the period September 1, 2016 through November 7, 2020, for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits without appropriate offset. The Board further finds that OWCP properly

¹⁵ 20 C.F.R. § 10.441; *see J.T.*, *supra* note 12; *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

¹⁶ *Id.* at § 10.441(a).

¹⁷ *See V.G.*, Docket No. 20-1520 (issued September 21, 2021); *J.R.*, Docket No. 17-0181 (issued August 12, 2020); *L.G.*, Docket No. 19-1274 (issued July 10, 2020).

denied waiver of recovery of the overpayment and properly required recovery of the overpayment by deducting \$500.00 from his continuing compensation payments every 28 days.

ORDER

IT IS HEREBY ORDERED THAT the May 18, 2021 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: April 5, 2022
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Janice B. Askin, Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board